

MINUTES

INSOLVENCY LAW COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

October 21, 2005

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on October 21, 2005 at the Law Offices of Wendel Rosen Black & Dean in Oakland, California. The following members attended the meeting in person (at Wendel Rosen Black & Dean), at a satellite site at Stutman Treister & Glatt in Los Angeles, California or by phone:

Andrew Alper
Elizabeth Berke-Dreyfuss
Douglas Boven
Christopher Celentino
Sharon Dutton
Ellen Friedman
Barry Glaser
Justin Harris
Eve Karasik
Michael Koch
Howard Kollitz
Douglas Kraft
David Meadows
Rhonda Nelson
Malhar Pagay

Paul Pascuzzi
Mark Porter
Maria Pum
William Sias
Ed Tredinnick
Colin Wied
Mary Jo Wiggins
Craig Wolfe

Russell Clementson (Ex Officio)
Lisa Fenning (Committee Advisor)
Rob Harris (ExComm Liaison)
Sandy Lavigna (Ex Officio member)

The following members did not attend the meeting with advance notice: Molly Baier, Donna Parkinson, and Dan Schechter. Gary M. Kaplan also attended the meeting as a visitor

The Chair called the meeting to order at approximately 10:08 a.m., and noted the presence of a quorum. In the absence of the Secretary, the Vice-Chair acted as Secretary of the Meeting and kept the minutes.

1. Introduction of New Members.

The Chair welcomed all new members of the Committee. By way of introduction, he requested that each member, advisor and ex officio introduce himself or herself, identify his or her firm and location and briefly describe his or her practice. After introductions were completed, the Chair indicated that Dan Schechter will not be attending Friday meetings this fall because he has a conflicting teaching obligation. However, Dan has indicated that he intends to remain actively involved with the Committee and to continue to serve as an advisor.

2. Approval of September 9, 2005 Minutes.

The Minutes of the September 9, 2005 meeting were approved as presented.

3. Membership.

a. Roster Accuracy. The Chair drew the Committee's attention to the Membership Roster & Mailing List and the Membership Review Matrix, requesting that members review the information on them and send him any corrections. The Chair was to add Andy Alper and Bill Sias to the Matrix

b. Subcommittee Assignments The Chair drew the Committee's attention to the Roster of Subcommittee Assignments for 2005-2006. He indicated that some members were assigned to a Subcommittee based on staffing needs. He asked any member who felt placed on the wrong Subcommittee to contact him. The Chair also thanked David Meadows for agreeing to chair the Legislation Subcommittee; Elizabeth Berke-Dreyfuss and Donna Parkinson for agreeing to co-chair the Education Subcommittee; Colin Wied for agreeing to chair the Publications Subcommittee; and Eve Karasik for agreeing to chair the Constituency/Outreach/Website Subcommittee.

c. Communications, List, Bar Profiles. The Chair noted to the members that the Committee has at its disposal a conference call number that can be used for Committee and Subcommittee business. He noted the Committee's e-Distribution list containing the names and emails of all Committee members and also reminded members that Susan Orloff and the Chair of ExComm are on the Committee's e-Distribution list and receive all correspondence sent over it. Finally, the Chair noted that the Committee also has a constituency e-Distribution list for its entire constituency. The Chair and Vice-Chair have access and others can create e-Bulletins on matters of interest for the Committee's constituency and use the Constituency list as well. The Chair also asked members to create or update their profiles on the State Bar website, noting Susan Orloff intends to follow up to insure all members of Standing Committees of the Business Law Section have profiles. Robert Harris also noted that through creation of a profile, members can obtain access to materials soon available only to Section members on a private website. The Chair indicated that the Committee's use of its e-Distribution lists is ahead of that of other Committees of the Business Law Section, and that we should continue actively using this resource.

d. Volunteers. Finally, the Chair noted that the Committee had a good group of talented members, and that volunteers were needed to avoid burdening the same people with the bulk of the Committee's workload. Rob Harris reminded members that if each one completed only one project per year for the Committee, that alone would accomplish an enormous amount of work for the Committee.

4. Meeting Schedule.

The Chair drew the members' attention to the 2005-2006 Meeting Schedule. He indicated that he intends to continue rotating host sites between Oakland, Los Angeles, Sacramento and San Diego and that he will try to be present in person at the host site for each meeting. He requested that members make an effort to attend in person at least at the host or

satellite site closest to them, and noted the option to call into the meetings through the conference call number if members cannot attend in person. Meetings have generally been scheduled on Thursdays or Fridays and with the goal of avoiding conflicts with scheduled meetings of ExComm so that the Committee liaison may attend.

5. Budget.

The Chair then indicated to the Committee that a Final Budget for the 2005-2006 year is due on November 30. He had prepared an initial draft included in the meeting materials. The Committee discussed whether a sufficient allowance had been made for space for a membership recruitment event at the California Bankruptcy Forum, noting that the Chair previously donated his suite (which he received as an officer of the California Bankruptcy Forum) for such an event, but that his term for that organization has ended. Rob Harris suggested that various options be explored, including renting a small meeting room, to identify the most cost-effective alternative. In addition, the members discussed allowances for web seminars and e-surveys. Further discussion was deferred to the November meeting, to allow consideration of the budget and take into account revisions required by the Education Subcommittee projects.

6. Legislative Subcommittee.

a. Standing Committee Guidelines for Legislation. The Chair indicated that Neil Wertlieb, from ExComm, had hoped to be available to provide information to the Committee on the affirmative legislative proposal ("**ALP**") process. However, Mr. Wertlieb was unavailable. After a brief discussion, the Chair indicated he would attempt to set up a conference call before the November meeting, on which Mr. Wertlieb would provide a background briefing for the ALP process, and the Chair will notify members of the details by email. ALPs are requests from the State Bar to the Legislature for creation or alteration of California law. They must be approved by the Committee in final form and submitted for consideration by ExComm by June 1, 2006 to be included on this year's legislative calendar.

b. Erroneous Bankruptcy Code References in California Law. Bill Sias indicated that he had reviewed all the California Codes last year to determine if references they included to the Bankruptcy Code were correct. Through this review, he identified 32 references to specific sections of the Code, four of which were wrong. Bill will put together a list of the references between now and the next meeting, and the Committee will determine whether an ALP to correct the erroneous references makes sense.

c. Venue Statute Lisa Fenning indicated that nothing new has happened since the last meeting on S 314 concerning amendments to the Bankruptcy venue statute. There have been some discussions about whether a technical correction bill should be introduced, but it appears that Members of Congress are fearful that reopening any aspect of the bill will invite demands for substantive change. In addition, in light of the pending nomination of Harriet Miers to the Supreme Court, the Senate will not likely be in a position to take up the Bankruptcy venue bill until after Congress returns from winter recess in January 2006.

d. S. 256 (BAPCPA)

(i) Central District of Ad Hoc Committee. Barry Glaser reported that there has been no meeting of the Ad Hoc Committee because of a rush to beat the October 17th effective date of BAPCPA, and because of the ECF upgrade in the Central District. The next meeting of the Ad Hoc Committee is expected to occur in mid-November.

(ii) Interim Rules and Forms. Paul Pascuzzi indicated that based on information the Committee has received, the Interim Rules have been adopted with little change in most districts. The National Rules Committee is considering additional proposals on a non-emergency basis, with comments due by August of 2006. A discussion ensued as to whether there were matters in the Bankruptcy Rules, as proposed, that needed comment from the Committee, and what the timing should be for such comments. Lisa Fenning indicated now would be the time to provide any such comments, including identification of any additional areas where change might be desirable. Once the proposed changes to the Rules are published for comment, changes are likely only to delete controversial topics and for wordsmithing. Lisa also indicated that she is working on an ABA Task Force on the attorney discipline process. Different Districts handle discipline differently, and with revisions to Section 707 of the Code in BAPCPA, this would appear to be an appropriate time to propose cleanup on attorney discipline procedures. The Chair called for volunteers for a Rules review project, to be dubbed the "Special Rules Task Force." Mary Jo Wiggins agreed to coordinate volunteers for the project for the Committee. Additional volunteers included Andy Alper, Chris Celentino, Sharon Dutton, Michael Koch, Howard Kollitz, Rhonda Nelson, David Meadows, Bill Sias and Craig Wolfe. Lisa Fenning indicated she would be willing to act as a liaison with the ABA Task Force and provide other helpful information. Rob Harris suggested consultation and coordination with other groups, such as the Commercial Law League of America. It was agreed that the Committee would first review the proposed Rule changes, possibly dividing them among the various volunteers, and develop a comment strategy before coordinating with other groups such as CLLA. Lisa Fenning reminded the Committee that other committees of the State Bar might have an interest in this project and comments as well, and these committees should be identified and kept in the loop. Robert Harris is to alert ExComm at the appropriate time that this project is coming and will require review.

(iii) Bankruptcy Cleanup Legislation. The Chair asked David Meadows and the Legislative Subcommittee to keep an eye on any development with regard to cleanups to BAPCPA.

(iv) Identity Theft Legislation. The Chair referred to the CLLA's update, included in the materials, indicating that Reps. Barton and Dingell have circulated the Data Accountability and Trust Act, to amend the Fair Credit Reporting Act. The Chair questioned whether any comment should be made on this proposed legislation. If so, coordination will be required with the Financial Institutions Committee and the Consumer Services Committee. David Meadows will attempt to retrieve and circulate the proposed legislation.

(v) Consumer Counseling Privacy Issues. Rob Harris raised an issue related to Consumer Credit Counseling required under BAPCPA. Will people who seek out consumer credit counseling for a potential bankruptcy which is not filed find their information transmitted

to credit reporting agencies? A discussion ensued after which it was concluded that we should monitor credit counseling as it goes forward and decide if any action might be desirable.

e. California Law Revision Commission The Chair indicated that we are generally monitoring the Commission's agenda and that the Legislative Subcommittee should generally be kept abreast of CLRC projects. Mike Koch indicated that anyone interested in doing so can request updates by email from the CLRC on an item-by-item basis, on items before the CLRC.

(i) Mechanics' Lien Provision The Chair indicated that the Committee has monitored this project from the prior year, and that no action is expected until early next year when the CLRC is expected to issue a report.

(ii) Assignments for the Benefit of Creditors Mark Porter described the history of the pending CLRC project on California's assignment for the benefit of creditors law (not listed on CLRC's agenda). He indicated that David Gould of McDermott, Will & Emory was appointed to produce a report for the CLRC a number of years ago. The Committee had also assisted in the report's preparation by transmitting a survey to its members. Mark understood that Mr. Gould has prepared a draft of a report for the CLRC, but that he was awaiting resolution of Sherwood Partners v. Lycos, the Ninth Circuit case holding California's preference statute for the assignment for the benefit of creditors mechanism is pre-empted by Section 547 of the Bankruptcy Code. Mark will follow up with David, in light of the denial of review by the Supreme Court in Sherwood, to see if there is any news about timing and completion of the report.

f. CCP § 697.530 and Judgment Liens Against Foreign Corporations Mark Porter gave the background to this project, which arose as a result of the adoption in California of Revised Article 9 of the Uniform Commercial Code. Prior discussions have occurred between the Committee and the UCC Committee about restoring a judgment creditor's ability to obtain a judgment lien against the assets of a foreign corporation doing business in California through recordation of the judgment with the California Secretary of State. Mark had spoken with Paul Barkus of the UCC Committee, and he had suggested that two members of his Committee and two members of the Committee be appointed to explore possible legislative fixes.

g. Secret Liens Mark Porter also overviewed the history of this project. The Los Angeles Bankruptcy Forum tried some time ago to identify "secret" or "hidden" liens (those not perfected or noticed by filing) authorized under California law. At some point a list, possibly from the Bay Area Bankruptcy Forum, had been circulated and David Meadows indicated that he would check his materials to see if he still had a copy of it. Robert Harris also indicated that the Committee had originally discussed a legislative fix, such as a registry of these liens, but quickly concluded such a fix was not practical. The focus now is to provide an educational resource for the Bar, by finalizing a compendium identifying these liens. The UCC Committee, as reported by Mark in an email to the Committee, is working on such a compendium. Perhaps when it is completed, and with their permission, it or other materials may be published on the Committee's website and become the subject of an e-Bulletin.

The Chair and Vice-Chair will continue to interact with the UCC Committee on these matters. It was the sense of the Committee that it would be valuable to have a representative attend meetings of the UCC Committee, if possible.

h. Model Real Estate Order The Chair gave a history of the Model Real Estate Order project, including the recent developments arising from the effort of the Bankruptcy Judges in the Northern District of California to produce a model sales order. The Chair indicated that the Model Real Estate Sales Order had been a long-standing Committee project. Rhonda Nelson, a new member and former Chair of the Committee, noted that during her tenure as Chair, the Model Real Estate Order had been a project of the Committee. The Committee asked Mr. Harris what needed to be done to obtain ExComm approval, and he suggested that the Chair contact Neil Wertlieb to identify the next steps for approval and posting of the order (which has already been posted for some time on the Committee's website).

i. Other State and Federal Bills Robert Harris raised an issue concerning deficiency judgments and judicial foreclosure of home mortgages in California. Rob recently read an article in *The Oakland Tribune* noting that the difficulty in obtaining a discharge after BAPCPA could unfavorably interact with California anti-deficiency rules. Section 580b of California Code of Civil Procedure prohibits a deficiency judgment following judicial foreclosure of a purchase money mortgage on a home. However, refinancing waives this protection. Members of the Committee discussed the anti-deficiency protections' origins during the Depression and that current lending practices have changed, so that the reach of the statutes may not continue to cover their original intended policy. Lisa Fenning also pointed out that distinction in anti-deficiency protection between purchase money loans and others first arose from the desire to prevent people from taking out a second mortgage on a house and using the money in a business while obtaining anti-deficiency protections. She noted, however, that lending practices including refinancing may have overtaken this policy and created a legal anomaly. Sharon Dutton suggested that the issue would best be raised in a nationwide context through relief for catastrophic events under the Bankruptcy Code. Lisa Fenning indicated that the issue of catastrophic loss and relief from some of the onerous provisions in BAPCPA has been raised repeatedly and Congress has provided no relief in BAPCPA. Gary Kaplan suggested that a policy to treat refinanced purchase-money debt in the same manner as original acquisition debt may find support under the UCC where the purchase-money security interest protection under Article 9 continues for a loan used to take it out. Also, Congress in the Tax Code provided mortgage interest deductions for home loans, whether for original or refinanced purchase money loans. Members were aware that there is likely to be resistance from lenders but felt a number of members of the Legislature might be interested in updating anti-deficiency protections to respond to changed lending practices. Barry Glaser indicated that he had personal experience with this anti-deficiency waiver, having lost his home in the 1994 Los Angeles earthquake after refinancing. Barry volunteered to work on any project which the Committee might undertake on this topic. Doug Kraft, Rob Harris and Justin Harris also volunteered to work on this project, if one is pursued.

j. Lis Pendens The Chair indicated that during the last term, an issue came up about equitable liens and whether they could support a lis pendens. Uncertainty has apparently prevailed in this area, and there was the suggestion that it might be an appropriate topic for an ALP to clarify that the lis pendens is available only in actions concerning *title* to real property.

and not to other disputes about the property. Dan Schechter was the principal proponent of this project, and the Chair will inquire of him whether he wishes to pursue any kind of ALP on the matter.

7. Education Subcommittee.

a. Winter SEI (January 27-29) Elizabeth Berke-Dreyfuss reported that the Committee is set for the program that Rob Harris and Barry Glaser are presenting entitled "The New Bankruptcy Act – What General Practitioners Should Know." Barry, Rob, Chris Celentino and Michael Cavan are the panelists. Meeting materials must be submitted by September 12th as well as written releases from these speakers for taping. Materials for the presentation cannot be more than 25 pages in total, without the Committee's waiving copying charges. Liz is to send Eve Karasik a summary of the program, and she will post it on the website. Liz will also send a summary of the program for an e-Bulletin as the date approaches.

b. Annual Meeting of the State Bar Elizabeth Berke-Dreyfuss indicated that January 25, 2006 is the deadline for the topic submissions to the Business Law Section for next year's Annual Meeting of the State Bar in Monterey. The Committee then considered the following potential topics to be organized by the referenced volunteers:

- Chapter 13 / Choosing a Chapter (Michael Koch);
- Health Care Bankruptcy (William Sias and Barry Glaser);
- Mechanics' Liens (Chris Celentino and Maria Pum with Mike Buckley, former Committee member).

After discussion, the Committee elected to submit these programs for consideration for the Annual Meeting.

c. Seminars and Webinars Ms. Berke-Dreyfuss raised the issue of other ways in which the Committee could present programs. Rob Harris asked if the Bar had identified a provider for webinars. Mr Harris will check with regard to mechanics and as to budget implications of webinars. He will also check to see if the Winter SEI program can be taped so that it can be put on the web.

Mark Porter reminded the Committee that in the past couple of years, topics chosen by the Business Section from among the Committee's submissions for the Annual Meeting and the SEI have been of a general nature, in keeping with the Bar's apparent perception that these meetings address the needs of general practitioners. Mark indicated his strong belief that part of the mission of the Committee is to provide more advanced programs for practitioners. Rhonda Nelson indicated that during her term as Chair more advanced programs had been produced for the Winter SEI and the Annual Meeting but they were poorly attended, and the Committee had discontinued them. Mark noted that he was suggesting using teleseminar capacity to attract a statewide audience and e-Bulletin capacity to announce these programs to attract a state-wide audience. He also indicated to Liz that he was prepared to assist in putting together these programs. Mark asked Sandy Lavigna if she knew of any topic at the intersection

of securities and bankruptcy law that merit consideration, and she indicated that she would contact him on possible topics. The Chair indicated that other Committees of the Business Section are gearing up to do teleseminars and the ExComm is trying to make it easier, so that members should circulate ideas about potential teleseminars and discuss them further.

8. Publications Subcommittee.

Colin Weid reported that he would contact the Business Law News publishers to see if there was any interest in an annual review this year. Other avenues for publication need to be explored and the Publications Subcommittee will be meeting to discuss the topic. Rob Harris also indicated that we should ask Ben Young if he is interested in doing an article on Sherwood Partners v. Lycos, since he represents parties in assignments for the benefit of creditors on a regular basis. The Chair reminded people that articles in Bankruptcy Law News are short and simple. They are approximately 2,500 words in length and can be prepared from items which come up in connection with research and practice from existing matters. Producing such an article does not require selecting a topic and devoting a massive investment to a brand new area.

9. Website and Constituency Subcommittee.

a. Web Updates. The Chair again thanked Eve Karasik for agreeing to chair the Subcommittee. She indicated that she intends to meet with the Subcommittee to review the current website and to make recommendations about changes to it. She indicated that other Committees of the Business Section are archiving materials that remain useful but are not current to prevent their sites from acquiring a "stale" look. The Chair suggested placing a link on the website to the forms which have recently been adopted after BAPCPA, and Rob Harris will send a link to Eve for this purpose. In addition, Eve indicated that the ADR Committee placed biographies and photographs of its members on its website. Eve raised the question of whether the Committee would like to follow suit, recommending against it. The sense of the Committee was that for its constituency and mission, the Committee did not want to post members' biographies and photos on the site. The Chair suggested that the Annual Meeting program on Bankruptcy and Family Law be taped and linked on the site. A member asked whether the website had any limits on size. Rob Harris indicated that the site had recently been migrated to hosting by the State of California, so that size should not be an issue. He reminded members that the Bar prohibits links to commercial sites (e.g., Findlaw).

b. E-Bulletins. The Chair noted that seven e-Bulletins were sent this month, and thanked Rob Harris and Lisa Fenning for providing him with information on recent e-Bulletins sent to the constituency. The Chair encouraged all members to remain involved in looking for new cases or court decisions and to send him or Mark Porter any potential information that they discover for an e-Bulletin.

c. Solicitation for Constituency List. The Chair indicated that the California Bankruptcy Forum Attendees' List had been cross-checked to identify CBF participants not present on the Committee's constituency e-Distribution list. Doug Boven volunteered to draft and send a short email inviting these people to join to Eve and to the Chair for review. The Chair will send out the email to the e-Distribution list once the text has been finalized.

10. **Update from ExComm Liaison.**

Rob Harris indicated that the ExComm has changed its reports regarding Standing Committees to a three-minute update format, focused on how a Committee is providing new services and new outreach to constituency. He asked the Committee to keep this in mind in connection with its projects.

11. **Adjournment.**

The meeting then adjourned at approximately 12:25 p.m.

► The next meeting of the Committee will be November 10, 2005, at Stutman Treister & Glatt PC, 1901 Avenue of the Stars, 12th Floor, Los Angeles, California 90067, phone: 310-228-5600 and the host-coordinator is Eve Karasik.

A handwritten signature in black ink, reading "Mark Porter". The signature is written in a cursive, flowing style. The "M" is large and loops around the "a". The "P" is also large and loops around the "o". The "r" and "t" are connected, and the "e" is a simple loop. The "r" and "t" are connected, and the "e" is a simple loop. The signature is written above a horizontal line.

Mark Porter, Secretary of the Meeting



BUSINESS LAW SECTION
INSOLVENCY LAW COMMITTEE

THE STATE BAR OF CALIFORNIA

July 21, 2005

To: Office of Governmental Affairs

Re: Senate Bill No. 314
(Introduced February 8, 2005)
(Senator Cornyn)

Committee Position:

☒ Support with amendments

Approved by Executive Committee on June 29, 2005

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Statement of Position:

The Insolvency Committee of the Business Law Section of the State Bar of California supports United States Senate Bill No. 314 with the following amendments:¹

1. Add "concerning an entity" after the phrase "title 11" in Title 28 USC section 1408(a)
2. Substitute "subject entity" in place of "person or entity" in section 1408(a)(1).
3. Replace references to "corporation" with "subject entity."
4. Replace references to "proceeding under title 11" with "case under title 11."
5. Change proposed section 1408(a)(2) from the following:

(2) in which a case under title 11 concerning the controlling corporation is pending, if--

- (A) the debtor is controlled by another corporation;
 - (B) within the 730 days before the date of the debtor's filing under title 11, the financial statements of the debtor have been consolidated with those of the controlling corporation in 1 or more reports filed under section 13 or 15(d) of the Securities Exchange Act of 1934; and
 - (C) the controlling corporation is a debtor in a proceeding under title 11;
- or

to read as follows:

(2) in which a case under title 11 is pending concerning a debtor who is in control of the subject entity, if, within the 730 days before commencement of the case with respect to the subject entity under title 11, the financial statements of the subject entity have been consolidated with those of such controlling debtor in 1 or more reports filed under section 13 or 15(d) of the Securities Exchange Act of 1934;

6. Change proposed section 1408(a)(3) from the following:

(3) in which a case under title 11 concerning the controlling corporation is pending, if--

- (A) the debtor is a corporation other than a corporation described in paragraph (2);
- (B) the debtor has been controlled by another corporation for not less than 365 days before the date of the filing of the debtor's petition under title 11; and

¹ A redlined version of the proposed text of 28 USC Section 1408, showing the proposed changes to Mr. Cornyn's version, is attached as Appendix 1. A second redlined version, showing the proposed changes to the statute as currently enacted, is attached as Appendix 2.

(C) the controlling corporation is a debtor in a proceeding under title 11

To read as follows:

- (3) in which a case under title 11 is pending concerning a debtor who is in control of the subject entity, if--
 - (A) the subject entity is not an entity described in paragraph (2); and
 - (B) the subject entity has been controlled by the debtor for not less than 365 days before the date of the commencement of the case under title 11 with respect to the subject entity.

7. Delete the definition of "control" proposed for 28 USC section 1408(b)(2) and replace it with the following:

(2) the term "control" means:

(A) the direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the corporation, partnership or limited liability company, other than a person that holds such voting securities –

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such person has not in fact exercised such power to vote; or

(B) any other means by which a corporation, partnership or limited liability company has the power to elect a majority of the directors, managing members, managing partners, trustees or similar persons that supervise the corporation, partnership or limited liability company.

(3) the term "person" has the meaning given that term in 11 USC section 101(41).

Analysis:

General Comments:

The Insolvency Committee of the Business Law Section of the State Bar of California, a committee of experts in bankruptcy law, strongly supports (with the amendments described above) United States Senate Bill 314, the Fairness in Bankruptcy Litigation Act of 2005. However, the Committee believes certain technical changes are critical to avoid the unintended consequences of (a) making the statute inapplicable to involuntary cases and (b) eliminating its application to non-corporate entities, thereby leaving major holes in the scope of a statute that must apply to all bankruptcy cases and all entities that might become debtors in such cases. In addition, several other technical changes would be beneficial in order to clarify the process and conform the proposed amendments with the terminology of the Bankruptcy Code (Title 11 itself) and other rules and statutes relating to bankruptcy cases.

Reasons for Support of the Bill

The bill seeks to curtail the forum and judge shopping available under current venue provisions, which often permit a company to reorganize or liquidate in a distant forum, hundreds or thousands of miles from where it conducts its business and is a member of the community, and where its creditors live and work. Senate Bill 314, if enacted, would reduce forum and judge shopping by requiring a company to file its bankruptcy petition in the district where its principal place of business or its principal assets are located and by permitting a member of a family of companies to file in another forum only if its parent had a petition pending in that forum.

Under current law, companies are permitted to file for bankruptcy (among other places) in their state of incorporation, even if their headquarters and their business operations, property and employees are elsewhere and they have few ties to the state in which they are incorporated. Creditors, particularly small vendors, service providers and employees whose lives and livelihoods may be deeply affected by the bankruptcy, are often deprived of a meaningful opportunity to participate in the proceedings. If a bankruptcy case is local, such persons may go down to the local courthouse to protect their interests themselves (or with their regular counsel), hear and participate in the arguments on significant matters, meet other interested parties and discuss the proceedings, form alliances and interest groups, compare notes and make future plans. If, instead, the debtor files in its distant state of incorporation, protecting the interests of such parties under current law often puts them to the unpleasant choices of paying their regular attorney to travel across the country or having their regular attorney appear by telephone before an unknown judge in an unfamiliar forum, or hiring unfamiliar counsel in a distant location (often at big-city hourly rates) to participate in the proceedings. In addition, many courts require retention of local counsel, putting creditors to the burden of paying two sets of counsel if they wish to send their regular attorney (who may be more familiar with the facts) to court. (The requirement of hiring local counsel often means the debtor, as well, must have double representation, a cost that is borne by the bankruptcy estate and reduces the amount available for distribution to creditors or shareholders of the debtor.) Small creditors and employees whose jobs are at risk or who have already been laid off can often ill afford to hire such counsel or make such a trip themselves. Thus, the proceedings tend to become skewed toward the interests of the big represented players; and the weight falls heavily on the judge to take into consideration the rights of parties who are not able to be present, while being often presented with large stacks of pleadings requiring immediate decisions involving significant rights and large sums of money,

Further, when proceedings occur in a state far from the debtor's actual operations, the judge will often be called upon to interpret unfamiliar law to resolve a number of types of disputes which regularly arise in bankruptcy cases. These disputes can include matters concerning real property leases, local taxes, wage and hour matters, local environmental or health and safety issues, intellectual property licensing, and real and personal property judgment liens, to name a few. This places an additional burden on the judge and the judge's staff to find and correctly apply everyday law more likely to be known to judges at the debtor's principal place of business, and increases the risk of legal error. It can also result in inconsistent legal precedent for debtors in the same location, which in turn may create an additional incentive for forum shopping.

In addition, when a significant enterprise is reorganized or liquidated locally, the press can be expected to follow the proceedings as an "interested neighbor." Representatives of the press can obtain information on the case by attending proceedings and talking with accessible counsel to discuss the debtor's plans. If the proceedings occur in a distant forum, obtaining this type of information is more difficult and the quality of the information the public receives may diminish.

In California alone, dozens of technology and internet companies headquartered and conducting a significant portion of their operations in the Silicon Valley, including Covad Communications, Exodus Communications, iBeam Broadcasting, Integrated Telecom, Liberate Technologies, Redback Networks and Webvan, have made their way to the Bankruptcy Court in Delaware.

Because it is the debtor's decision as to where its bankruptcy petition is filed, in addition to the geographic challenges creditors face that can weight the proceedings in favor of a debtor, a smorgasbord of forum choices gives the debtor the opportunity for judge-shopping that can further shift the proceedings in the debtor's favor. For example, under current law, clever counsel for a debtor that is part of a group of affiliated companies can test-file a petition on behalf of an insignificant subsidiary and, if a "favorable" judge is assigned to the case, file petitions for the remaining related entities and have them consolidated with the same judge. Senate Bill 314 would reduce the opportunity for judge-shopping by limiting the availability of a venue other than that where the principal place of business or principal assets are located, to cases in which the parent entity has already legitimately filed a petition.

Reasons for Recommended Amendments:

While the purpose of the bill is laudatory, care must be taken to avoid confusion and limitation of the scope of the statute. The following recommended amendments will assure that the venue statute can be applied in all bankruptcy cases and that its application cannot be manipulated because of inconsistencies between its language, the Bankruptcy Code, and other rules and statutes governing bankruptcy cases.

Amendments 1, 2 and 3: The types of organizations subject to the statute is overly limited in the original bill. Its use of the term "corporation" in several places leaves important parts of the statute inapplicable to many types of entities. Since this is the only venue provision for bankruptcy cases, it must apply to all types of entities that could be debtors in bankruptcy cases. The change to the use of "person" and "entity" resolves this dilemma.

The Bankruptcy Code defines "person" to include individuals, partnerships and corporations. See 11 USC section 101(41). The Bankruptcy Code defines "entity" to include a governmental unit as well as a "person." See 11 USC section 101(15). Consequently, the phrase "person or entity" in existing section 1408(a)(1) is redundant, and the term "corporation" is underinclusive, as it excludes partnerships.

Amendment 4: This amendment is for consistency with the usage of the terms "case" and "proceeding" in 28 USC section 1334. A "case" in section 1334 refers to the main

bankruptcy case; whereas a “proceeding” means a related proceeding such as an adversary proceeding or a motion in the case.

Amendments 5 and 6: The restructuring of these paragraphs is suggested in order to better fit the terminology changes described above. More importantly, these changes eliminate language in the original bill that would have limited the provisions to cases voluntarily filed by the debtor, thereby leaving no rule relating to venue of involuntary cases.² The limiting language of the original bill would have had disastrous but, we are sure, unintended consequences.

Amendment 7: This amendment is intended to provide a definition that is a closer fit with the needs of the venue provision and avoid potential confusion that was probably not intended by the bill’s sponsor:

- The Bank Holding Company definition of “control” found in 12 USC section 1841(a)(2)(A) and (B) is overinclusive in that it includes references to banks, which are for the most part not permitted to seek relief under the Bankruptcy Code (see 11 USC section 109.)
- Section 1841(a)(2)(C) permits the Federal Reserve Board to make a determination on the issue of control. Such a determination would be better left to the Bankruptcy Court in which the petition is filed.
- The word “company” appears several times in 12 USC section 1841(a)(2), but is not a defined term in the Bankruptcy Code. A definition used in the Bankruptcy Code which can provide easier tracking is “person,” found in 11 USC section 101(41).

Germaneness:

The Committee’s members regularly practice in Bankruptcy Court and deal with insolvency issues generally. As a result, the Committee believes that its members have the special knowledge, training, experience, and technical expertise to evaluate Senate Bill 314 and knowledgeably support it.

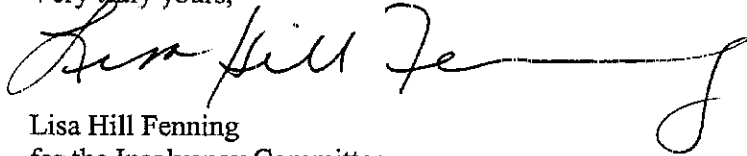
Caveat

This position is that only of the Insolvency Committee of the BUSINESS LAW SECTION of the State Bar of California. The position has not been adopted by either the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

² Note the original language in Section (b)(2) “ . . . within the 730 days before the filing by the . . . ” and in Section (b)(3) “ . . . 365 days before the filing of the subject entity’s petition . . . ”

Membership in the BUSINESS LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Hill Fenning", with a long horizontal flourish extending to the right.

Lisa Hill Fenning
for the Insolvency Committee

cc: Suzanne Graeser, Esq.
Chair, Executive Committee, Business Law Section

Marie M. Moffat, Esq
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Chief Legislature Counsel, State Bar of California

Jeffrey C. Selman, Esq.
Vice-Chair, Legislation, Executive Committee, Business Law Section

Appendix 1

Redline of
Changes Recommended by the
Insolvency Committee of the Business Law Section of the State Bar of California
vs.
Senate Bill No. 314 as introduced February 8, 2005

§ 1408. Venue of cases under title 11

(a) Except as provided in ~~section 1410~~section 1410 of this title, a case under title 11 concerning an entity may be commenced in the district court for the district—

(1) ~~in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case~~entity have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person~~entity~~ were located in any other district; or

(2) ~~in which a case under title 11 is pending concerning the controlling corporation is pending, if—~~

~~(A) the debtor~~a debtor who is controlled by another corporation;

~~(B) in control of the subject entity, if, within the 730 days before commencement of the case with respect to the date of the debtor's filing~~subject entity under title 11, the financial statements of the debtor~~subject entity have been consolidated with those of the~~such controlling corporation~~debtor in one or more reports filed under section 13 or 15(d) of the Securities Exchange Act of 1934; and~~

~~(C) the controlling corporation is a debtor in a proceeding under title 11; or~~

~~(3)~~

~~in which a case under title 11 is pending concerning the controlling corporation is pending, if—~~

(3) ~~(A) the a debtor who is a corporation other than a corporation in control of the subject entity, if—~~

(A) the subject entity is not an entity described in paragraph (2); and

(B) the debtor~~subject entity has been controlled by another corporation the debtor~~ for not less than 365 days before the date of the ~~filing of the debtor's petition~~commencement of the case under title 11; and

(C) the controlling corporation is a debtor in a proceeding under title 11 with respect to the subject entity.

(b) For purposes of subsection (a)--

(1) if the debtor subject entity is a corporation not an individual, the domicile and residence of the debtor such entity are located where the debtor's such entity's principal place of business is located, and

(2) the term 'control' has the meaning given that term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(2) the term "control" means:

(A) the direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the subject entity, other than such voting securities held --

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if the holder has not in fact exercised such power to vote; or

(B) any other means by which an entity has the power to elect a majority of the directors, managing members, managing partners, trustees or similar persons that supervise the subject entity.

(3) the term "entity" has the meaning given that term in 11 USC section 101(15).

(4) the term "person" has the meaning given that term in 11 USC section 101(41).

Appendix 2

Redline of
Changes Recommended by the
Insolvency Committee of the Business Law Section of the State Bar of California
vs.
28 USC section 1408 as currently enacted

§ 1408. Venue of cases under title 11

(a) Except as provided in section 1410 of this title, a case under title 11 concerning an entity may be commenced in the district court for the district--

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the ~~person or entity that is the subject of such case~~entity have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such ~~person~~subject entity were located in any other district; or

(2) in which there is ~~pending a case under title 11~~ is pending concerning a debtor who is in control of the subject entity, if, within the 730 days before commencement of the case with respect to the subject entity under title 11, the financial statements of the subject entity have been consolidated with those of such person's affiliate, general partner, controlling debtor in one or partnership, more reports filed under section 13 or 15(d) of the Securities Exchange Act of 1934; or

(3) in which a case under title 11 is pending concerning a debtor who is in control of the subject entity, if--

(A) the subject entity is not an entity described in paragraph (2); and

(B) the subject entity has been controlled by the debtor for not less than 365 days before the date of the commencement of the case under title 11 with respect to the subject entity.

(b) For purposes of subsection (a)--

(1) if the subject entity is not an individual, the domicile and residence of such entity are located where such entity's principal place of business is located.

(2) the term "control" means:

(A) the direct or indirect ownership or power to vote 25 percent or more of any class of voting securities of the subject entity, other than such voting securities held –

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if the holder has not in fact exercised such power to vote; or

(B) any other means by which an entity has the power to elect a majority of the directors, managing members, managing partners, trustees or similar persons that supervise the subject entity.

(3) the term “entity” has the meaning given that term in 11 USC section 101(15).

(4) the term “person” has the meaning given that term in 11 USC section 101(41).